87-1632

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

YONKERS BOARD OF EDUCATION
Petitioner

v.

UNITED STATES OF AMERICA AND
YONKERS BRANCH-NATIONAL ASSOCIATION
FOR ADVANCEMENT OF COLORED PEOPLE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED

I.

Where The Placement Of Subsidized Housing In One Section Of A Municipality Has A Residual Impact On The Racial Composition Of Schools, And Where The School Board Has Not Participated In The Placement Of Such Housing, May Such A School Board Be Held Liable For School Segregation For Not Taking Action To Overcome The Segregative Effects Of Such Housing Patterns?

II.

Where A School Board Has Neither Operated A Dual School System Historically Nor Committed A Significant Number Of Acts Of Intentional Segregation In the Area Of Student Assignments, May the School Board Nonetheless Be Held Liable For School Segregation Because Of Unintended "Disparities" In Educational Opportunity Between Schools With Differing Proportions Of Majority And Minority Students?

III.

Whether In Determining The Existence Of "Segregated" Schools In a Multi-Ethnic School System, It Is Appropriate To Group Hispanics And Blacks As A Single Category Of "Minorities," And To Count Asians or Other Minority Groups As "Whites," In the Absence Of Any Evidence Of School Board Discrimination Against Either Hispanics Or Asians?

LIST OF PARTIES

Petitioner

Yonkers Board of Education

Respondents

United States of America

Yonkers Branch - National Association for the Advancement of Colored People (NAACP) and Regina Ryer, a minor by her next friend, Charlotte Ryer

Other Parties Below

City of Yonkers and Yonkers Community Development Agency, Defendants

United States Department of Housing and Urban Development, Defendant -Third Party Defendant; (dismissed at the conclusion of the liability trial, *see* App. at 9a, n.1).

Yonkers Federation of Teachers, Defendant-Intervenor (intervened prior to and participated in the school remedy hearing)

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IN THE
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OCTOBER TERM, 1987

No.

YONKERS BOARD OF EDUCATION,
Petitioner,

v.

UNITED STATES OF AMERICA and
YONKERS BRANCH - NAACP,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Yonkers Board of Education respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 28, 1987.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals for the Second Circuit, not as yet reported, is printed in Volume Two of the Appendix.

The memorandum opinion of the United States District Court for the Southern District of New York holding Petitioner liable for intentional segregation of its public schools is reported at 624 F. Supp. 1276 (S.D.N.Y. 1985) and is reprinted in Volume One of the Appendix.

The remedial orders of the United States District Court for the Southern District of New York are reported at 635 F. Supp. 1538 (S.D.N.Y. 1986) (school remedy order) and at 635 F. Supp. 1577 (S.D.N.Y. 1986) (housing remedy order). Both remedial orders are reprinted in Volume Two of the Appendix.

The memorandum opinion of the District Court denying Petitioner's motion to sever the claims of housing discrimination from the claims of school segregation and granting Respondent NAACP's motion to intervene is reported at 518 F. Supp. 191 (S.D.N.Y. 1981).

The memorandum opinion of the District Court denying Petitioner's motion to dismiss for lack of subject matter jurisdiction the Title IV and Title VI claims raised by Respondent United States of America is an unpublished decision and is referenced in the District Court's memorandum opinion. *See* App. at 476a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 28, 1987. This Petition For Writ of Certiorari was filed within 90 days of the date of that judgment. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved in this case are: the Fourteenth Amendment, Section 1, to the United States Constitution; 42 U.S.C. §1983; 42 U.S.C. §2000c-6 of Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000c *et seq.;* and 42 U.S.C. §2000d of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.* The full text of these provisions is printed in Volume Two of the Appendix.

STATEMENT OF THE CASE

This is an unprecedented case combining claims of school segregation and housing discrimination against separate and legally-independent governmental entities. The District Court expressly stated that it is "different from the typical school

desegregation case" because of the issue of whether housing discrimination by a municipality "is relevant to the determination of liability for school segregation" on the part of a school board. *United States* v. *Yonkers Board of Education,* 624 F. Supp. 1276, 1376-77 (S.D.N.Y. 1985); Appendix at 188a.[1] No such case, according to the District Court, "has ever previously been brought." App. at 484a.

The District Court held that housing discrimination is relevant and found the school board liable for systemwide school segregation. The Court of Appeals, noting the uniqueness of this action "in its conjoined attack on the actions of state and municipal officials with respect to segregation in both schools and housing," affirmed the District Court "in all respects." *United States* v. *Yonkers Board of Education,* ___ F.2d ___ (2nd Cir. 1987); App. at 577a, 583a.

Petitioner, the Yonkers Board of Education, operates a multi-ethnic school district, the fourth largest public school system in the State of New York. The school district shares the same geographical boundaries with the City of Yonkers. In 1980-81, the year this action was filed, the public school population was 21,863: 62% white; 21% black; 16% hispanic; 2% asian and other minority. *See* App. at 201a.

By statute, Petitioner is an independent state agency subject to the control of the New York State Board of Regents and the Regents' Commissioner of Education. It is an agent of the state, not the City of Yonkers, and has by statute "entire and exclusive charge and control" of the Yonkers public schools. N.Y. Const. Art. 5, §4; N.Y. Educ. Law, § 2554.

The Board of Education consists of nine trustees. Under state law, trustees are appointed by the mayor of the City of Yonkers for staggered five-year terms. The City Council neither advises nor consents to the appointment, and the authority of the

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[1]All further references to the District Court liability opinion are to the Appendix.

mayor ends with the appointment. The mayor has neither the power to remove nor the power to review the actions of trustees. N.Y. Educ. Law, § 2553(3). The trustees are accountable solely to the State Commissioner of Education.

On December 1, 1980, the United States filed suit against the City of Yonkers and the Yonkers Community Development Agency, alleging that the City and CDA had "followed a systematic pattern of selecting sites for public and subsidized housing projects" that had both perpetuated and aggravated residential racial segregation in the City of Yonkers. In addition, the United States alleged that the City's selection of 36 sites for 6,644 units of public and subsidized housing in southwest Yonkers had "seriously aggravated racial segregation" in the public schools as well. App. at 12a-13a. The government also joined claims against Petitioner, alleging that by various practices the school board had segregated students by race in violation, *inter alia,* of Titles IV and VI of the Civil Rights Act of 1964 and the Fourteenth Amendment. The government did not allege that Petitioner had any involvement in the City's site selection practices.

On January 27, 1981, Petitioner, citing *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 23 (1971), moved to sever the government's housing claims from the school claims on the ground that "the Board of Education has no authority over any aspect of public housing" and was helpless to remedy the effects of the alleged housing discrimination. The District Court denied the motion. *United States* v. *Yonkers Board of Education,* 518 F. Supp. 191, 194-197 (S.D.N.Y. 1981).

On March 4, 1981, the Yonkers Branch of the National Association for the Advancement of Colored People and a named student by her mother as next friend moved to intervene as parties plaintiffs in light of public comments by the Justice Department that it was considering dismissing the case. The District Court granted the motion to intervene, *id.* at 201-03, and certified the case as a class action on behalf of all black residents of Yonkers who were residents of or eligible for publicly-assisted housing in

Yonkers or were parents of students attending public school in Yonkers.

With the District Court's denial of Petitioner's motion to sever, the litigation proceeded and was tried as a combined school and housing segregation case — the first of its kind. *See* App. at 484a. Trial, which took 89 days, began on August 2, 1983 and ended on September 19, 1984.

On November 20, 1985, fourteen months later, the District Court issued its liability opinion. In that opinion, the District Court first determined the City's liability for its housing practices. It held that the City's placement of subsidized housing in southwest Yonkers, to the exclusion of other sections of the City, constituted a pattern and practice of racial discrimination by city officials. *See* App. at 182a.

After finding the City liable for its public housing practices, the Court addressed the liability of the school authorities. The threshold issue was the definition of "segregation" in a school system which is multi-ethnic. The answer was crucially dependent on the statistical treatment which the District Court accorded black and hispanic students. Although the greatest numbers of black and hispanic students were in schools in southwest Yonkers, many of these schools had relatively even distributions of white, black and hispanic students. Such schools were thus relatively "balanced" if the three racial/ethnic categories were considered as distinct groups; they were "racially" imbalanced, however, or "segregated," if blacks and hispanics were simply grouped statistically as a single category of "minority," thus rendering such schools "predominantly minority" for purposes of analysis. Although no evidence at trial was introduced of intentional discrimination against hispanics by school officials, the District Court combined hispanics and blacks to conclude that the schools were "segregated." By contrast, the Court treated asians and other minority groups, most of whom attended predominantly white schools, as "white." App. at 191a-92a; 201a, ns. 83, 84.

Even using this statistical analysis, the District Court expressly determined that Petitioner (a) had *not* failed to fulfill an obligation to dismantle a dual school system, and (b) had *not* "engaged in what, standing alone, could fairly be characterized as a significant number of affirmative acts of intentional segregation in the area of student assignments . . . ." App. at 491a-92a. The Court also expressly found that "disparities" in the quality of various school facilities, and other measures of educational "opportunity" affecting certain predominantly minority schools, were "*not* created by discriminatory allocation of funds or other resources" and that a number of the "disparities existed well before the presence of significant numbers of minorities in the city." App. at 492a (emphasis added).

Despite these express findings, however, the District Court held that, as a matter of law, its contemporaneous determination of housing discrimination against the City of Yonkers was relevant to its determination of Petitioner's liability for school segregation, given the "segregative impact" of the placement of public and subsidized housing on the racial composition of the schools and Petitioner's "failure to implement any significant desegregative school reforms" to alleviate the impact of such housing patterns. App. at 500a. The Court similarly held that Petitioner's failure to reorganize its schools to alleviate racial imbalance caused by housing patterns was relevant to the liability determination because the absence of such a desegregative plan resulted in the "perpetuation" of "educational inequalities" among the district's schools. App. at 493a.

Based primarily on the segregative impact of the City's housing practices on the schools, the Court held the City liable for school segregation as well. App. at 522a. Following remedial hearings, the Court on May 13, 1986 ordered the desegregation of the entire school system. App. at 533a. The Court subsequently entered a housing remedial order requiring the development of 200 units of public housing in east Yonkers and submission of a plan for the development of additional subsidized housing "in

existing residential areas in east or northwest Yonkers." App. at 562a.

The Court of Appeals concluded that the District Court "properly applied the appropriate legal principles" and affirmed the opinion and orders against both defendants "in all respects." App. at 583a.

The decision below thus stands for the proposition that where racial imbalance in public schools is caused, in significant part, by discriminatory housing practices, school authorities may be held liable for systemwide segregation for failing to take action to rectify the results of such practices. In an entirely novel fashion, the Court below has also held that given the continuing existence of unintended educational "disparities" in racially/ethnically mixed schools, the failure to adopt a desegregation plan is an unconstitutional denial of equal educational opportunity. This unprecedented decision has staggering implications for the management of the affairs of public school systems throughout the nation.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Placing Liability On School Authorities For The Residual Effects of Discriminatory Housing Practices Presents An Issue Of Imperative Public Importance As To Which There Is A Conflict In The Circuits

This case, as the District Court squarely acknowledged, "is not simply another in a long line of school desegregation cases." App. at 484a. It is unique because a legally autonomous school board has been placed under judicial supervision because it did not adopt a racial balance plan to alleviate the segregative impact of public housing discrimination and ameliorate unintended educational "disparities," despite *explicit* findings that the school board itself was not operating a dual school system; had not "engaged in what, standing alone, could fairly be characterized as a significant number of affirmative acts of intentional segregation

in the area of student assignments . . .," App. at 492a; and was not responsible for decisions affecting the placement of the public housing. *See, e.g.,* App. at 181a-82a, 495a, 513a, 514a-15a. In the face of such findings, the District Court's conclusion, as affirmed by the Court of Appeals, that the Petitioner "is liable for the racial segregation of Yonkers public schools," App. at 506a, is without support in any of this Court's previous school cases. *See Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Bradley* v. *Milliken,* 418 U.S. 717 (1974).

A. School Authorities Should Not Be Held Responsible For The Effects Of Discriminatory Housing Patterns

Despite findings that in some discrete areas Petitioner had committed isolated acts of intentional segregation or discrimination,[2] the District Court itself made clear that, after a searching

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[2]These highly questionable findings, some of which the Court itself admitted were "difficult" and presented a "fine line," *see* App. at 335a, 338a, involved no direct evidence whatever of discriminatory intent and related primarily to:

—the placement of a few black students (approximately 0-5 in 1975-76, approximately 27-37 in 1979-80) in special education classes in predominantly white schools, a practice which the Court concluded was "stigmatizing" and "discriminatory," but *not* "segregative"; *see* App. at 354a-55a, 488a.

—the "disproportionately" low enrollment of blacks (but not hispanics) at a single vocational high school (Saunders), where "no evidence was presented . . . that school officials established entrance requirements at Saunders in order to exclude minorities from school" and "no evidence exists of any minority student being denied admission at Saunders in part because of their race;" App. at 335a.

—the uneven distribution of black faculty among the various schools, where the Court itself conceded (a) that "the mathematical extent" of such imbalance in black staff assignments "was not overwhelming" and (b) Petitioner's "practical difficulties" in unsuccessfully renegotiating its collective bargaining agreement with the teachers' union to override a seniority clause which constrained Petitioner from making staff assignments at random; *see* App. at 487a, 365a; and where "segregative" staff assignments do not, in any event, establish a *prima facie* case of intentional segregation of *students. See Dayton Board of Education* v. *Brinkman,* 443 U.S. 526 at 536, n. 9 (1979);

Footnote continued on next page

review of the evidence, it was unable to conclude that Petitioner, by its own acts, had significantly caused or enhanced racial segregation in its schools. Rather, as the Court explicitly stated:

> The Board has not failed to fulfill an obligation to dismantle a dual school system; nor has it engaged in what, standing alone, could fairly be characterized as a significant number of affirmative acts of intentional segregation in the area of student assignments, particularly on the elementary school level.
>
> * * *
>
> In the instant case, the record contains substantially less (or no) evidence of many of the classic segregative student assignment techniques — optional or non-contiguous attendance zones; segregative out-of-district transfer policies; a pattern of segregative school openings, closings, or racial gerrymandering of attendance lines. . . .

App. at 491a-92a, 497a.

Thus, under the District Court's theory, the factor of "primary significance" in its determination of Petitioner's liability for school segregation "is the fact that the *City* has been found liable,

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> —three isolated attendance line changes after 1954 involving 47 students, where, paradoxically, students of *both* races were reassigned (81% white, 19% black), *see* App. at 289a, and the failure to close a racially imbalanced junior high school, where the school's predominantly black enrollment pattern was originally caused by increasing minority population in the school's attendance area and a decline in white enrollment at the same period. *See* App. at 278a-79a.

As the Court's discussion of the legal significance of the housing and educational "disparities" claims makes clear, none of these erroneous findings against Petitioner was, in any event, sufficient independently or cumulatively to hold Petitioner liable for systemwide segregation, and the District Court did not purport to do so. *See* App. at 491a-92a. [Note: Petitioner reserves the right to argue the erroneousness of these and other subsidiary findings, including the taking of school property to remedy the City's housing violations, if certiorari is granted, but does not include these discrete issues as among the reasons for the granting of certiorari.]

under relevant legal standards, for intentionally maintaining and exacerbating racial segregation in Yonkers," since the City's public housing policies have had a "segregative impact" on the schools. App. at 499a (emphasis added). In the District Court's view, the impact of this form of "state action" by a separate agency rendered the Petitioner liable for continuing to maintain its traditional neighborhood school policy of student assignments rather than taking some form of compensatory "desegregative" action. App. at 499a. This view of "state action," as one commentator has noted,

> allowed the court [in the *Yonkers* case] not only to find the city responsible for school segregation based in large part upon its segregative housing practices, but also to impose liability upon the *school board* for its failure to take desegregative action to overcome the effects of the city's segregative housing practices, an approach that has been generally eschewed by the courts.[3]

Indeed, in *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* this Court expressed serious reservations about precisely this approach. While the Court under the facts presented left open the question of "whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by school authorities, is a constitutional violation requiring remedial action by a school desegregation decree," the Court stated:

> One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination . . . . Our objective in dealing with these cases is to see that *school authorities* exclude no pupil of a racial minority from any school,

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[3]Days, Book Review, 95 Yale L.J. 1737, 1767 (1986) (Emphasis in original). Drew S. Days III, then Assistant Attorney General, signed the original complaint in this litigation for the United States.

> directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, *even when those problems contribute to disproportionate racial concentrations in some schools.*

402 U.S. at 22-23 (emphasis added).

Five years after *Swann,* three Justices in *Austin Independent School District* v. *United States,* 429 U.S. 990 (1976), expressed the same misgivings. In *Austin,* Justice Powell concurring, joined by Justices Burger and Reinquest, wrote:

> The principal cause of racial and ethnic imbalance in urban public schools across the country — north and south — is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, *discrimination in housing — whether public or private — cannot be attributed to school authorities.*

429 U.S. at 994 (emphasis added).

Thus, while a majority of this Court has not definitively resolved this issue, several Justices have clearly expressed in principle considerable reservations about the wisdom of holding school authorities liable for the discriminatory housing policies of others. The approach adopted by the courts below in this case, where Petitioner had no role in or control over the housing policies of the City of Yonkers, erroneously disregards these reservations in imposing liability on Petitioner. The result is to place on school authorities an unwarranted and wholly impractical obligation to monitor and review on an ongoing basis the practices of other agencies, to inquire into the motivation for and ultimately the constitutionality of such practices, to assess the effects of such practices on the racial composition of the schools, and, finally, to determine whether a course of "corrective" action in student assignment policy is required.

Neither the District Court nor the Court of Appeals gave any consideration to the disabling limitations of this approach. Wholly unanswered, for example, is how a legally independent school

board would, as a practical matter, ever be able to reach an informed judgment that the segregative impact of a municipality's housing patterns is, in fact, the product of *intentional* discrimination, such that the board's neighborhood school policy could no longer be regarded (in the District Court's analysis) as "race-neutral." See App. at 499a.

The voluminous record in this case clearly illustrates the problem. The public housing practices of the City of Yonkers as reviewed by the District Court relate to innumerable sites, actual and considered, cover a period of thirty years, and implicated HUD's role and responsiblity. The Court's finding that the City's policies constitute *intentional* discrimination followed "nearly 100 days of trial during which 84 witnesses testified and 38 depositions, as well as thousands of exhibits, were received in evidence . . . ." App. at 7a. The District Court itself required an additional fourteen months to arrive at its decision — a decision which the City then appealed to the Second Circuit.

The distinction between discriminatory *intent,* which is unconstitutional, and *effect,* which is not, is one of the most subtle and difficult in the law, and one that "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252 at 266 (1977). The District Court itself noted that its inquiry involved the review of actions of city officials who "were entirely well-meaning public servants acting in accordance with their perception of what was . . . in the best interests of the community." App. at 9a-10a. Indeed, even the underlying issue of *whether* the City's housing practices had adversely affected the racial composition of the schools in any measurable way was the subject of sharp disagreement among acknowledged experts. *See* App. at 434a-36a. Clearly, no school board has the resources or the ability to engage in such a review and inquiry.

Moreover, no school board has the "competence" or the authority to make findings regarding discriminatory violations by other institutions as a predicate to formulating race-conscious

remedial relief. *See Regents of University of California* v. *Bakke*, 438 U.S. 265, 309 (1978) (regents of university medical school not competent to adjudicate "particular claims of illegality" as justification for adoption of race-conscious measures in admissions policies.). As Justice O'Connor, concurring, stated in *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 288 (1986):

> . . . a governmental agency's interest in remedying 'societal' discrimination, that is, *discrimination not traceable to its own actions*, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.

(Emphasis added.)

The problems which the public schools in large urban areas confront today are urgent and massive. To add to that agenda responsibility for assessing and untangling the legal ramifications of the placement of public housing with regard to student assignment policies is a mistake of serious proportions. "One vehicle can carry only a limited amount of baggage." *Swann, supra*, 402 U.S. at 23.

B. The Decision Below Conflicts With Decisions Of Other Courts of Appeal

In imposing liability on Petitioner for the segregative impact of public housing discrimination, the decision of the courts below is in conflict in principle, as earlier shown, with this Court's cautionary language in *Swann* and *Austin* against using school desegregation cases "to achieve broader purposes lying beyond the jurisdiction of school authorities," *Swann, supra*, 402 U.S. at 22. This conflict the District Court candidly recognized. App. at 496a-99a; 512a-13a.

Moreover, the decision below is flatly in conflict with a series of cases from other circuits. The Sixth Circuit has consistently rejected the argument that school boards may be held liable for discriminatory housing practices of other units of government which result in racial imbalance in the schools. In *Bell* v. *Board of*

Education, Akron Public Schools, 638 F.2d 963, 968 (6th Cir. 1982), the Court stated:

> We do not find any case addressing the argument that a school board otherwise innocent of segregative intent is liable for the discriminatory housing practices of other governmental agencies. We decline to accept this argument. Under this argument the discriminatory conduct of the FHA in making housing loans and local housing authorities in the construction and rental of public housing is attributable to school boards. *Such a proposal places too heavy a burden on the schools to remedy wrongs for which they are no more or less responsible than the plaintiffs, the courts, the churches, the Congress or other institutions.* Plaintiffs do not suggest how the schools, after a finding of liability, would go about remedying this problem or what kind of order a federal court could enter that might as a practical matter have a chance of changing the fact that black and white families live in separate neighborhoods in most towns and cities.

(Emphasis added.)

The concurring opinion in *Bell* is to the same effect:

> I also agree with Judge Merritt's opinion to the effect that intentionally segregative housing actions by other governmental entities, even if proved, cannot be the basis of ordering the Board of Education of Akron to attempt to remedy the results thereof in the schools. In addition to the statement of Justice Powell upon the grant of *certiorari* in *Austin Independent School District* v. *United States,* 492 U.S. 990, 97 S.Ct. 517, 50 L.Ed. 2d 603 (1976) . . . this court . . . said:
>
> > . . . the critical fact determination in an action charging a school board with violation of the rights of minority pupils is whether an existing racial imbalance is intentionally caused by discriminatory practices of the Board. A statistical imbalance standing alone is not enough; official discrimination is required to invoke the

> protection of the Fourteenth Amendment. *On this basis we upheld the exclusion by the district court of evidence of alleged discrimination in the public and private housing market of Cincinnati — acts over which the school board had no control.*

683 F.2d 963 at 970 (emphasis in original).

See also Bronson v. *Board of Education of the City School District of Cincinnati,* 578 F.Supp. 1091, 1104-05 (S.D. Ohio 1984) ("It is well settled that absent a showing of a nexus between the conduct of any of the named [school] Defendants and the acts of housing authorities or other governmental or private actors or agencies responsible for shaping . . . residential patterns . . ., these named defendants herein *cannot* be held liable for, or be responsible for remedying, any racial imbalance that may be attributable to the practices and policies of the independent actors and agencies.") (emphasis in original); *Higgins* v. *Board of Education of Grand Rapids,* 508 F.2d 779, 788-89 (6th Cir. 1974) ("... discrimination by other than school authorities cannot be relied upon as the sole basis for showing a violation by the school board."); *Deal* v. *Cincinnati Board of Education,* 419 F.2d 1387, 1391-92 (6th Cir. 1969) ("Appellants contend that housing patterns in Cincinnati are segregated as a result of both public and private agencies, and that the School Board 'may not close its eyes to this reality' but should remedy it. We are not told how or by what lawful authority the School Board can remedy the housing patterns of a neighborhood. . . . We find no basis to enter any such order."); *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55, 60, n. 4 (6th Cir. 1966) (affirming exclusion of evidence in school desegregation case of alleged housing discrimination; relief for proven public housing discrimination properly obtainable from housing, not school officials).

Although it has not specifically decided the issue, the Fourth Circuit has recently indicated that it would also adopt the rule that school boards are not liable for housing discrimination. *Goldsboro City Board of Education* v. *Wayne County Board of Education,* 745 F.2d 324, 331-332, n. 15 (4th Cir. 1984):

> [O]ther courts have held that school boards are not responsible for the decisions of other public agencies arrived at without encouragement or contrivance from the school boards. [Citations omitted.] Judge Craven's statement in *Bradley* v. *School Board*, 462 F.2d at 1066, indicates that we would follow the Sixth Circuit and say that the school board is not responsible for the housing decisions made by other governmental actors ("That there has been housing discrimination . . . is deplorable, but a school case, like a vehicle, can carry only a limited amount of baggage.") However, we need not and do not resolve the issue in the present case.

See also Bradley v. *School Board of the City of Richmond, Virginia*, 462 F.2d 1058, 1066 (4th Cir. 1972).

Taken together, these cases stand for two propositions: that school boards may not and should not be held liable for housing discrimination over which they have no control; and that the proper remedy for proven housing discrimination should be placed where it belongs — on those directly responsible. The District Court attempted to distinguish these cases by stating that the essential issue is whether "some meaningful connection exists between the policies of public housing officials and the policies of school board officials." App. at 498a. In proceeding, however, to hold the Board liable for school segregation, the Court simply accorded "primary significance," App. at 499a, to the previously determined liability of the City for intentional housing discrimination — the very factor for which a majority of other courts have held school boards *not* responsible.

At bottom, the District Court's analysis, as affirmed by the Court of Appeals, is that the existence of discriminatory housing patterns which affect the racial composition of schools — as decided *contemporaneously* with its analysis of the School Board's liability for maintaining a neighborhood school policy — is a factor which fatally taints such a system of student assignments. Under this analysis, a historically-rooted neighborhood school system can no longer be considered "race-neutral" and is thus constitutionally unacceptable. App. at 499a.

This unprecedented decision — candidly recognized as such by the District Court — and its surpassing public importance warrants immediate review by this Court, not only in the interests of nearly 200,000 citizens of Yonkers but as a guide to the future actions of similarly situated school boards in all parts of the country.

II. Judicial Interposition In The Operation Of The Public Schools Because Of The Presence Of Educational "Disparities," In The Absence Of Either Intentionally Segregative Student Assignments Or A Discriminatory Allocation Of Funds And Resources, Is Contrary To Traditional Principles Of Judicial Restraint

In this case, the placement of public housing and its effects on the schools of southwest Yonkers was part of a larger complex of intractable educational and social problems which Petitioner has struggled to address and overcome since at least the late 1960's. At its core, the question is how to improve and "equalize" educational opportunity where a number of schools are in inner-city areas, are surrounded by housing projects and other conditions of social and economic decay, and are attended by large numbers of minority students from disadvantaged backgrounds.

Not satisfied that Petitioner, despite measurable efforts to ameliorate these problems, had wholly succeeded in "equalizing" educational opportunity in all of its aspects within predominantly minority schools, the District Court held that Petitioner's failure to adopt a "comprehensive desegregative" plan constitutes a deliberate "perpetuation of inequalities in educational opportunity" so as to render it "liable for racial segregation of Yonkers public schools." App. at 493a, 505a. In the absence, however, of predicate findings that Petitioner was operating a *de jure* segregated system, the judiciary has no basis for intruding in this fashion into the educational process. As this Court stated in *Swann*:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; *absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.*

402 U.S. 1, at 16 (emphasis added). *See also Washington* v. *Seattie School District No. 1,* 458 U.S. 457, 479-80 (1982) (question "whether to provide an integrated learning environment rather than a system of neighborhood schools" ordinarily one of school board discretion).

The "tangible inequalities in the quality of education" to which the District Court refers, *see* App. at 494a, are familiar to virtually every urban school system. Older school facilities, smaller playgrounds, disciplinary problems, lower teacher expectations, and higher ratios of teacher and student turnover are not conditions unique to inner-city, predominantly minority schools in Yonkers alone. But judicial authority, as this Court has observed in a different context, "intervenes only when local authority defaults." *Swann, supra,* 402 U.S. at 16.

Local school authority did not default in this case. Indeed, the District Court's *own* findings directly reflect Petitioner's determined and often successful efforts to equalize educational opportunity. Compensatory education programs were targeted for the inner-city schools in southwest Yonkers and introduced on a massive scale. Intensive reading programs were initiated. Teacher-student ratios were reduced. Individualized instruction was provided. Special resources teachers were added. Extra resources and supplies were furnished. *See generally,* App. at 311a-12a. By the end of the tumultuous 1970's Petitioner's educational initiatives had successfully overcome a number of the earlier "disparities." *Id.*

Moreover, the District Court's quite specific findings concerning the causes of "unequal" educational opportunity wholly fail to support its ultimate legal conclusion of liability. The existence of "educational disparities" in the quality of school facilities, student enrollment and turnover, and other measures of educational opportunity were *not*, as the Court expressly found, "created by discriminatory allocation of funds or resources." App. at 492a. In sum, perceived differences in the quality of education between racially imbalanced schools were purely adventitious:

> The record supports the conclusion that the Board did not deliberately fail, for partly racial reasons, either to provide remedial or other special instructions programs or to fairly allocate its programmatic resources among the district's white and minority schools.

App. at 313a.

These crucial findings of non-discrimination by school authorities should have brought the District Court's inquiry to an end. Yet lacking any evidence of either significant acts of intentional segregation by Petitioner in the area of student assignments *or* of a discriminatory allocation of funds and resources, the Court as a fallback attempted to equate the very concept of racial/ethnic imbalance with unequal educational opportunity. Thus:

> The relative inequality in educational opportunities available at southwest Yonkers predominantly minority schools has contributed to the identification of minority schools in Yonkers as educationally inferior schools, with the two characteristics becoming virtually inseparable. *This confluence of racial identifiability and relative educational opportunity has served to reinforce the segregative demographic patterns which have evolved in the city.*

App. at 319a (emphasis added).

Under this analysis, the Court concluded that Petitioner should have corrected conditions of racial and ethnic imbalance

to improve educational opportunity as a relative matter and that its failure to do so "resulted in the perpetuation of the remaining educational inequalities in the district's schools." App. at 493a. Thus, Petitioner's failure to adopt a racial balance plan — presumably one of sweeping dimensions if conditions of racial imbalance were to be eliminated — is central to the Court's liability determination. There is no warrant in this Court's cases for such an approach. *See Washington* v. *Seattle School District, supra,* 458 U.S. at 479-80; *Swann, supra,* 402 U.S. 1 at 16.

Finally, the District Court's conclusion that Petitioner was responsible for "perpetuating" educational inequalities by failing to adopt a desegregation plan represents a contradiction in terms. Desegregation will not enlarge the size of playgrounds at inner city schools, reduce the age of the buildings, diminish the mobility rates of low income families, or change the scope of curricular offerings. *See* App. at 492a. "Disparities" of this kind are not related to segregation *per se*; they could as easily exist in a fully integrated school system.

Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 42 (1973) (quoting *Dandridge* v. *Williams,* 397 U.S. at 487). That some "disparities" remain, despite, as here, the best efforts of school authorities, is not a justification for judicial intervention into the educational policy-making process of local authority. Indeed, "in view of the infinite variables affecting the educational process [no] system [can] assure equal quality of education except in the most relative sense." 411 U.S. at 24.

III. In Determining The Existence Of "Segregated" Schools In A Multi-Ethnic School System, It Is Inappropriate To Group Hispanics And Blacks As A Single Category Of "Minorities," While Counting Asians Or Other Minority Groups As "Whites," In The Absence Of Evidence Of Discrimination By School Authorities Against Either Hispanics Or Asians

In *Keyes* v. *School District No. 1,* 413 U.S. 189, 196 (1973), the Court noted that "[w]hat is or is not a segregated school will necessarily depend on the facts of each particular case." Yonkers is not a bi-racial community; it is multi-ethnic. In such a setting, the crucial determination of whether there are even "segregated" schools *in fact* depends on how school enrollments consisting of differing mixes of racial and ethnic groups are to be analyzed.

Of the twenty-five elementary schools which Petitioner was operating as of the filing of the complaint, only three had enrollments greater than 50 percent black. Similarly, only one of the six middle/junior high schools, and none of five high schools, was more than 50 percent black. *See* App. at 203a-04a; *see also* GX53. Thus, although the school system as a whole was not racially *balanced,* the presence of significant numbers of whites in the great majority of schools attended by large numbers of blacks, together with the attendance of blacks in *every* predominantly white school, precluded a finding that in conventional black/white terms the system as a whole was "segregated." Moreover, if hispanics as a group were viewed as distinct from blacks, enrollment in many of Petitioner's schools reflected almost "ideal" distributions of black, white and hispanic students — Fermi Middle School, for example, was 38 percent white, 25 percent black, 37 percent hispanic in 1980-81. *Ibid.*[4]

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[4]Other examples of schools in 1980-81 which had relatively equal distributions of white, black and hispanic students, but which the District Court found to be "segregated," included: School 9: 37% white, 36% black, 27% hispanic; School 18: 25% white, 35% black, 40% hispanic; School 27: 43% white, 25% black, 32% hispanic; Hawthorne Middle School: 31% white, 29% black, 40%

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The District Court, however, arbitrarily grouped hispanics with blacks as a single "minority" group and thus readily concluded that the school system as a whole was "segregated" since a majority of Petitioner's schools were either predominantly white or predominantly "minority." App. at 191a-92a, 203a. The District Court, moreover, *excluded* asians as a "minority" group altogether, and treated them as "white" for statistical purposes, despite the presence of asians in significant numbers in at least three of the "predominantly white" schools. *See* GX53. As affirmed by the Court of Appeals, this simplistic and reflexive approach to the definition of a "segregated" school system is in conflict with the standard in *Keyes*.

Although the District Court purported to rely on *Keyes* in holding that "blacks and hispanics are to be considered as a group in determining whether the school system is racially segregated," App. at 191a-92a, this Court in *Keyes* made clear that to justify doing so there must first be a sufficient showing that, in comparison with the treatment afforded white students, black and hispanic students have suffered identical discrimination. 413 U.S. at 197-98. Thus, for purposes of defining a "segregated" school in the Denver system, this Court noted an abundance of evidence that in both Denver and the Southwest hispanics and blacks had suffered identical discrimination. "*In that circumstance,* we think [plaintiffs] are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of 'segregated' schools." 413 U.S. at 198 (emphasis added).

The District Court performed no such analysis in this case. Indeed, neither the Court's opinion nor any aspect of the record reflect *any* evidence at all of discrimination against hispanics within the Yonkers school system. In that circumstance, schools with a combined predominance of blacks and hispanics plainly should not have been treated as "segregated" — a determination

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hispanic; Yonkers High (the most "racially imbalanced" high school): 38% white, 30% black, 32% hispanic. *See* App. at 203a-04a, 461a; *see also* GX53.

which, in this case, has made all the difference. Moreover, neither the opinion nor the record reflects any evidence of discrimination against asians. Asians, too, are an identifiable minority group. *See, e.g., Lau* v. *Nichols,* 414 U.S. 563 (1974). Accordingly, the Court's differing treatment of the two minority groups for statistical analysis — grouping hispanics with blacks, asians with whites — is purely arbitrary and unwarranted.

In the absence of proven discrimination, there is no justification for "combining" these specific minority groups with either blacks or whites — for either "favoring" or "disfavoring" them to reach a desired statistical result. *See Wygant* v. *Jackson Board of Education, supra,* 476 U.S. at 284, n. 13 (lacking findings of "prior, purposeful discrimination against members of each of these minority groups"—blacks, orientals, American Indians, and persons of Spanish descent—school board's preferential treatment of each group held unconstitutional); *See also J.A. Croson Co.* v. *City of Richmond,* 822 F.2d 1355, 1361 (4th Cir. 1987), *cert. granted* ___ U.S. ___ (1988) (similar aggregation of minority groups held not justified given record of past discrimination against blacks only).

Keyes teaches that the question of whether to aggregate other minority groups with blacks in determining the existence of "segregated" schools depends, in each case, on whether the individual school system has historically discriminated against such groups. In the *absence* of such a history of discrimination, as the Sixth Circuit has explicitly held, the *Keyes* test permits hispanic students to be treated in a remedial context "as *white* for desegregation purposes." *Bradley* v. *Milliken,* 620 F.2d 1143, 1156 (6th Cir. 1980) (emphasis added).

If hispanic students in one school system, in the absence of discrimination against them, may be treated as white for the *remedial* purpose of desegregating formerly black schools, then there can be no justification — in the similar absence of discrimination — for aggregating hispanics with blacks in a different school system with the result that schools are deemed "segregated" for liability purposes. The application of the *Keyes* test as

it affects the status of hispanics and other minority groups in school desegregation cases should and must be the same everywhere.

CONCLUSION

The decision of the District Court, affirmed in all respects by the Second Circuit Court of Appeals, constitutes an unprecedented and unwarranted extension of the holdings of this Court. Its impact is national in scope.

Because of the surpassing importance of the issues involved for public education, and to resolve the conflict among the circuits regarding the liability of school authorities for the effects of housing discrimination, a writ of certiorari should be issued.

Respectfully submitted,

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